[* 1]

SHORT FORM ORDER

INDEX No. 08-394
CAL. No. 10-00214-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-29-10
ADJ. DATE 8-31-10
Mot. Seq. # 001 - MD
002 - XMD

----------X

MARY LOU ROSA,

Plaintiff,

- against -

YAMILETH DIAZ, ELMER DIAZ-BLANCO, LENNDY MARTINEZ and HERMINIO MARTINEZ,

Defendants.

----------X

WALLACE, WITTY, FRAMPTON & VELTRY
Attorney for Plaintiff
600 Suffolk Avenue, Suite A
Brentwood, New York 11717-4304

ANDREA G. SAWYERS, ESQ.
Attorney for Defendants Diaz & Diaz-Blanco
3 Huntington Quad., Suite 102S, P.O. Box 9028
Melville, New York 11747

ROBERT P. TUSA, ESQ.
Attorney for Defendants Martinez
898 Veterans Memorial Highway, Suite 320
Hauppauge, New York 11788

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants Yamileth Diaz and Elmer Diaz-Blanco, dated May 27, 2010, and supporting papers; (2) Cross Motion by the defendants Lenndy Martinez and Herminio Martinez, dated June 14, 2010, and supporting papers; (3) Affirmation in Opposition by the plaintiff, dated August 4, 2010, and supporting papers; (4) Supplemental Affirmation in Opposition by the plaintiff, dated August 10, 2010, and supporting papers; (5) Reply Affirmation by the defendants Yamileth Diaz and Elmer Diaz-Blanco, dated August 25, 2010, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant Yamileth Diaz and defendant Elmer Diaz-Blanco for summary judgment dismissing the complaint on the ground that plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5104(d) is denied; and it is further

ORDERED that the cross motion by defendant Lenndy Martinez and defendant Herminio Martinez for summary judgment dismissing the complaint is also denied.

In this action plaintiff Mary Lou Rosa seeks damages for personal injuries allegedly sustained on January 20, 2006, as a result of a motor vehicle accident that occurred at the intersection of Marshall

Avenue and Clark Street in the Town of Islip. The collision allegedly occurred when a vehicle operated by defendant Lenndy Martinez and owned by defendant Herminio Martinez (hereinafter "Martinez defendants") collided with a vehicle operated by defendant Yamileth Diaz and owned by Elmer Diaz-Blanco (hereinafter "Diaz defendants"). Plaintiff was riding as a passenger in the vehicle operated by defendant Lenndy Martinez at the time of the accident. By her bill of particulars, plaintiff alleges that she sustained various injuries as a result of the accident, including among other things a tear of the spraspinatus tendon; right shoulder derangement; disc herniation at level C5-6; cervical disc displacement at levels C3-4, C4-5, C6-7, and C7-T1; disc bulges at levels C3-4, C4-5, C6-7, C7-T1, L3-4, L4-5 and L5-S1; lumbosacral disc displacement at levels L3-4, L4-5 and L5-S1; and cervical, thoracic, and lumbar myofascitis.

The Diaz defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Defendants' submissions in support of their motion include, among other things, a copy of the pleadings, a transcript of plaintiff's deposition testimony, affirmed medical reports of Dr. S. Farkas and Dr. Naunihal Sachdev Singh, and magnetic resonance imaging (MRI) reports of Dr. Steven Mendelsohn regarding plaintiff's right shoulder and cervical spine. The Martinez defendants cross-move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). The Martinez defendants adopt the arguments and evidence concerning serious injury contained in the motion papers of the Diaz defendants.

Plaintiff opposes the motion and cross motion for summary judgment, arguing that defendants' submissions are insufficient to show prima facie that she did not suffer a serious injury as a result of the subject accident. Alternatively, plaintiff asserts that evidence presented in opposition to the motion raises triable issues of fact as to whether she sustained a serious injury. Plaintiff also argues that the cross motion of the Martinez defendants is untimely. In opposition, plaintiff submits hospital records relating to her treatment in the emergency room of Southside Hospital, medical affirmations of Dr. Daniel Korman, unaffirmed MRI reports of Dr. Robert Diamond, and an affidavit and medical records of Adalberto Morales, Jr., a chiropractor. In her supplemental affirmation in opposition, plaintiff submits affirmed MRI reports of Dr. Robert Diamond.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant

seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

To qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that plaintiff's activities were significantly curtailed due to such injury (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Hamilton v Rouse***, 46 AD3d 514, 846 NYS2d 650 [2007]; ***Ocasio v Henry***, 276 AD2d 611, 714 NYS2d 139 [2000]). In addition to demonstrating an inability to perform "substantially all" usual activities for at least 90 days of the 180 days following the accident, a plaintiff asserting a 90/180 claim must show through competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see* ***Penaloza v Chavez***, 48 AD3d 654, 852 NYS2d 315 [2008]; ***Hamilton v Rouse***, *supra*; ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2007]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2000]).

Here, the medical report of Dr. Farkas states that an examination of plaintiff's lumbar spine revealed no spasm or crepitus to palpation, and that range of motion testing revealed forward flex to 90 degrees (90 degree normal), lateral bending to 30 degrees (30 degrees normal), and rotation to the left and right to 40 degrees (45 degrees normal). It states that a range of motion examination of plaintiff's cervical spine revealed rotation to the left and right to 70 degrees (70 to 80 degrees normal), and flexion and extension to 30 degrees (30 to 50 degrees normal). It further states that a range of motion examination of plaintiff's right shoulder revealed that plaintiff was able to abduct to 170 degrees bilaterally (170 to 180 degrees normal), and that no crepitus was detected. Dr. Farkas opines that plaintiff has no orthopedic disability and that she is capable of performing her usual duties of her occupation and carrying out the activities of daily living without restriction.

The medical report of Dr. Naunihal Sachdev Singh states that an examination of plaintiff's cervical spine revealed no paravertebral muscle tenderness or spasm, and that range of motion testing revealed flexion to 45 degrees (45 degrees normal), right and left lateral flexion to 45 degrees (45 degrees normal), and right and left lateral rotation to 80 degrees (80 degrees normal). It states that palpation of plaintiff's lumbar spine revealed no vertebral tenderness, and that range of motion testing revealed flexion to 90 degrees (90 degrees normal), extension to 25 degrees (25 degrees normal), right and left lateral flexion to 25 degrees (25 degrees normal), and right and left lateral rotation to 30 degrees (30 degrees normal). It further states that there was tenderness over plaintiff's right shoulder joint and range of motion testing revealed flexion to 110 degrees (180 degrees normal), extension to 30 degrees

(50 degrees normal), abduction to 110 degrees (180 degrees normal), and external rotation to 90 degrees (90 degrees normal). A range of motion examination of plaintiff's left shoulder revealed normal ranges of motion. Dr. Singh opines that plaintiff does not have a neurological disability and that she is not disabled from working or from activities of daily living. As to plaintiff's right shoulder injury, it states "opinion deferred to the appropriate specialist."

Contrary to the assertions by defendants' counsel, the reports of Dr. Farkas and Dr. Singh are insufficient to shift the burden of proof to plaintiff (*see* ***Mondevil v Kumar***, 74 AD3d 1295, 903 NYS2d 248 [2010]; ***Held v Heideman***, 63 AD3d 1105, 883 NYS2d 246 [2009]; ***Dux v Maddaloni***, 51 AD3d 967, 861 NYS2d 672 [2008]). Significantly, Dr. Singh's report identified significant limitations in the ranges of motion of plaintiff's right shoulder based upon the examination of plaintiff, which took place almost four years after the subject accident (*see* ***Joissaint v Starrett-1 Inc.***, 46 AD3d 622, 848 NYS2d 259 [2007]; ***Zamaniyan v Vrabeck***, 41 AD3d 472, 835 NYS2d 903 [2007]). Furthermore, while Dr. Farkas' medical report finds that during the range of motion testing of plaintiff's right shoulder revealed abduction to 170 degrees, Dr. Singh's report finds that plaintiff exhibited 110 degrees in abduction. Moreover, whereas Dr. Farkas considered the normal range of lumbar rotation to be 45 degrees, Dr. Singh considered the normal range of lumbar rotation to be 30 degrees. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1998]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [1996]). These discrepancies between defendants' experts create an issue of fact for the jury to determine (*see* ***Martinez v Pioneer Transp. Corp.***, 48 AD3d 306, 851 NYS2d 306 [2008]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [2003]). In addition, defendants' moving papers failed to specifically address plaintiff's allegations, as contained in her verified bill of particulars, that as a result of the accident she sustained injuries which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activity for a period of not less than 90 days during the 180 days immediately following the accident (*see* ***Chicas v Catalano***, 39 AD3d 686, 833 NYS2d 625 [2007]; ***DeVille v Barry***, 41 AD3d 763, 839 NYS2d 216 [2007]; ***Sayers v Hot***, 23 AD3d 453, 805 NYS2d 571 [2005]). Plaintiff testified during her deposition that she did not go to work for three months following the subject accident. Dr. Farkas and Dr. Singh failed to relate their findings to this category of serious injury for the period of time immediately following the accident (*see* ***Neuburger v Sidoruk***, 60 AD3d 650, 875 NYS2d 144 [2009]; ***Ali v Rivera***, 52 AD3d 445, 859 NYS2d 713 [2008]; ***Faun Thai v Butt***, 34 AD3d 447, 824 NYS2d 131 [2006]). Since defendants have failed to establish their entitlement to judgment as a matter of law, the sufficiency of plaintiff's papers in opposition to the instant motion need not be considered (*see* ***Zamaniyan v Vrabeck***, 41 AD3d 472, 835 NYS2d 903 [2007]; ***Doggett v Kelly***, 294 AD2d 464, 742 NYS2d 557 [2002]). Accordingly, the Diaz defendants' motion for summary judgment is denied.

As to the Martinez defendants' cross motion for summary judgment, CPLR 3212(a) provides that, unless the court fixes a deadline for filing a summary judgment motion, such motion shall be made no later than 120 days after the filing of the note of issue, except with leave of court on "good cause" shown. Here, the note of issue was filed on February 3, 2010. Therefore, any motion for summary judgment had to be made by June 3, 2010. The Martinez defendants, without leave of court, cross-moved for summary judgment on June 14, 2010, and have not offered any reason for the delay. Hence, the court is without discretion to consider their late motion, whether meritorious or not (*see* ***Miceli v***

State Farm Mut. Auto. Ins. Co., 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]; ***Espejo v Hiro Real Estate Co.***, 19 AD3d 360, 796 NYS2d 162 [2005]; ***Thompson v New York City Board of Education***, 10 AD3d 650, 781 NYS2d 617 [2004]). Accordingly, the cross motion by the Martinez defendants for summary judgment is denied.

Dated: 11/20/10

PETER H. MAYER, J.S.C.